

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON
TRANSCRIPT OF PROCEEDINGS

IN RE: C.R. BARD, INC., PELVIC REPAIR MDL NO.
SYSTEM PRODUCTS LIABILITY LITIGATION 2:10-MD-2187

IN RE: AMERICAN MEDICAL SYSTEMS, INC., MDL NO.
PELVIC REPAIR SYSTEM PRODUCTS 2:12-MD-2325
LIABILITY LITIGATION

IN RE: BOSTON SCIENTIFIC CORPORATION MDL NO.
PELVIC REPAIR SYSTEM PRODUCTS 2:12-MD-2326
LIABILITY LITIGATION

IN RE: ETHICON INC., PELVIC REPAIR MDL NO.
SYSTEM PRODUCTS LIABILITY LITIGATION 2:12-MD-2327

IN RE: COLOPLAST CORP. PELVIC SUPPORT MDL NO.
SYSTEMS PRODUCTS LIABILITY LITIGATION 2:12-MD-2387

STATUS CONFERENCE

March 21, 2013

BEFORE THE HONORABLE **JOSEPH R. GOODWIN**, District Judge
AND
THE HONORABLE **MARY E. STANLEY**, Magistrate Judge
AND
THE HONORABLE **CHERYL A. EIFERT**, Magistrate Judge

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P R O C E E D I N G S

JUDGE GOODWIN: Well, good morning. We have a thinner crowd in the back than usual. People are losing interest. What does that mean?

It's a pleasure to see all of you this morning. As they say, all good things must come to an end. And today is one of those days as, in this case, it is the last day with Judge Stanley.

I know that each of you join me in wishing her well. I have resisted with all of my ability her retirement. I even threatened to tell people that she was a thief, used extortion tactics as best I could, but she's persistent.

I am honored to have served with her and I am most grateful for the hard work that she has rendered for this court and the excellent job that she's done for all of us. She's been a wonderful asset and we're going to miss her.

There are a number of excused attorneys today: Mike Bonasso, Bob Adams, Fred Thompson, Bryan Aylstock, Paul Farrell, Jr. If you're not on the list and you're absent today, you've not been excused.

I want to make a point about the continued absence of leadership counsel. And I ask those of you who are here, and this is particular -- well, it's pointed to the people that aren't here. Today there are attorneys with some very good reasons for their absences, but I want everyone to

1 understand that their full attention to this case is
2 essential.

3 Cases in other jurisdictions must be put aside, and
4 your firms must make arrangements to take care of them and
5 find other lawyers to take care of those matters or we must
6 seek someone to substitute as counsel, lead counsel in the
7 case.

8 The coherence of progress in these cases depends upon
9 working together and getting to know one another and being
10 up-to-date on what's going on.

11 I recognize the burdens that it places on a firm when
12 an MDL case is undertaken. And, of course, prepaid
13 vacations and family matters are important. But this isn't
14 a single case or five cases. This now is 14,000 cases and
15 growing by the day.

16 So, you are the leaders and you are the representatives
17 of 14,000 cases. And while it's easier to excuse a single
18 lawyer in a single case, it's very difficult to excuse a
19 lawyer who's meant to be representative and have an
20 important role to play with regard to 14,000 cases. I hope
21 everybody will take that seriously in the months ahead as
22 these MDLs heat up.

23 As we did last time, I'm going to address certain
24 general issues, and then I'll turn the status conference
25 over to Judge Stanley and Judge Eifert to do the heavy

1 lifting.

2 I ask in the future that you submit your joint agenda
3 in this format; that is, put the things I need to deal with
4 first and then the discovery issues afterwards.

5 The first topic that I have that I think I should
6 address is the wisdom, desirability, and status of tolling
7 agreements.

8 Would anybody like to address that?

9 MR. GARRARD: Yes, Your Honor.

10 JUDGE GOODWIN: Mr. Garrard.

11 MR. GARRARD: First, I'd like to digress for just
12 one moment and say that on behalf of all the people that sit
13 on my side of the table, and I suspect I speak for the other
14 side of the table, we are appreciative of the efforts of
15 Judge Stanley and we will miss her. But more than that, we
16 wish her the very best in whatever endeavors she undertakes
17 and happy travels.

18 MAGISTRATE JUDGE STANLEY: Thank you.

19 MR. GARRARD: Your Honor, we put the issue of
20 tolling agreements on the agenda because it's been visited
21 before and it's kind of been sitting over here somewhere.
22 We have watched the efforts of Coloplast and they have
23 entered into tolling agreements and it appears to be working
24 relatively well from that perspective.

25 The anticipation of a number of attorneys is that in

1 the coming months, the rate of filings may increase. And
2 we're at a place where the defendants have a significant
3 number of cases actually filed in the court in which they
4 are achieving or will achieve significant improvement.

5 But we wanted to bring this back to the table because
6 from efficiency, from cost, from burdens on the Clerk's
7 Office, it seems to us that it's time to potentially
8 consider tolling agreements that are not prejudicial to the
9 defendants, but allow there to be an identification rapidly
10 of cases, case names, type of products, that sort of thing
11 that go into a tolling mechanism so that things can continue
12 to run smoothly and that no one or no process gets
13 overburdened.

14 So, we wanted to put it back on the table. I recognize
15 that Your Honor cannot force anybody to enter into a tolling
16 agreement. But we wanted to have some open discussion and
17 see if that's a possibility for us for the future,
18 particularly in light of what is anticipated to be a
19 significant number of filings over the next months.

20 JUDGE GOODWIN: All right.

21 Who from the defense side first would like to address
22 this subject? I know one can't speak for all, but does
23 anybody have something they'd like to say?

24 Ms. Jones, I know you haven't been doing anything for
25 the last couple months.

1 MS. JONES: I've not, Your Honor, so I thought I'd
2 be the first one to jump up.

3 JUDGE GOODWIN: Okay.

4 MS. JONES: I, I confess to Your Honor that, that
5 there have been some earlier discussions in the past on
6 tolling agreements and that, to date, that my clients have
7 not entered into them. And there are various reasons for
8 that; in, in part because it's important for us to know and
9 understand and appreciate the universe of what we're really
10 dealing with.

11 The other issue, frankly, has been if we were dealing
12 with one jurisdiction and we knew we were dealing with one
13 jurisdiction, it would be much easier to agree upon a
14 tolling agreement. But we are being pulled in multiple
15 directions and I think, frankly, that that will have an
16 impact upon whether or not, you know, our client is really
17 interested in proceeding with a tolling agreement.

18 If there is a benefit to our clients to proceed with
19 one, it's certainly willing to consider it. But in the
20 absence of there being a benefit to the client, then,
21 frankly, it's to our detriment not to know what the entire
22 universe is and go ahead and force the filings.

23 JUDGE GOODWIN: Let me hear from anyone else and
24 then I have a comment.

25 MR. GARRARD: Your Honor, let me make one comment

1 if I may.

2 The benefit to the defendants in a tolling arrangement,
3 if we could work out the proper language, is that Ms. Jones
4 can get exactly what she wants. And, that is, she can know
5 the universe now quicker and more efficiently.

6 One of the things that I know bothers the defendants is
7 what they call the tail. And I'm not wise enough to know
8 exactly what the tail is going to be. But I think with a
9 tolling arrangement, they could know very quickly what the
10 current universe is with some definition of -- if Ms. Jones
11 is interested in whether it's a, a Prolift case or a
12 Prolift+M or whatever, there's no reason why that
13 information can't be provided along with the jurisdiction
14 where the case would ultimately end up, the name, and a few
15 other things.

16 So, I think that is a benefit to them. And I think
17 it's an efficiency benefit to them as well because I have no
18 doubt that as cases come in through the filing process, that
19 generates significant work that has to be done within their
20 own shops and I understand that. So, I think there is a
21 benefit.

22 JUDGE GOODWIN: Mr. Garrard, let me ask you a
23 question.

24 MR. GARRARD: Yes, sir.

25 JUDGE GOODWIN: Am I correct that there is a date

1 in mid July of the 11th or something like that that is
2 significant?

3 MR. GARRARD: Your Honor, there, there is a date
4 in July, July the 11th, the Court is correct, which is two
5 years post the time that the FDA came down with its warning
6 particularly about prolapse cases.

7 There are different thoughts as to what is the meaning
8 of that. But I am sure that there are some people that
9 worry that that could potentially trigger a statute of
10 limitations. I don't happen to believe that it does. I
11 still believe it's a factual determination.

12 But that is a date, Your Honor, that people are
13 concerned about. And, and I would predict to the Court that
14 you would see, and the Clerk's Office would see, a
15 substantial number of filings in the interim. And we were
16 trying to find a way to perhaps make that more efficient.

17 JUDGE GOODWIN: Anybody else for a defendant that
18 would like to give me their thoughts on tolling agreements?
19 I won't hold you to any representations. I'm just curious.

20 Yes, ma'am.

21 MS. MOELLER: Our client currently in this MDL is
22 not interested in tolling agreements for many of the same
23 reasons that Ms. Jones has already alluded to.

24 JUDGE GOODWIN: Thank you, Ms. Moeller.

25 Let me, let me say why I am interested in a short

1 tolling agreement as opposed to an open-ended or lengthy
2 tolling agreement. And that has to do with the
3 administration of these cases. And I recognize it's not
4 your problem and we'll deal with it some way.

5 But we've had to borrow Clerk's Office staff from other
6 districts and had to hire people. And what I am concerned
7 about is an influx of, in some cases, not very well thought
8 out complaints early -- late June, early July. And I'm not
9 suggesting a particular length of time, but I can tell you
10 that 30, 60, 90 days would be helpful to the Court in that
11 regard.

12 And there's more than one reason for this. This is all
13 inside baseball. But our statistical year starts July 1.
14 The cases that are filed before July 1 count in with all the
15 cases that are filed now. The amount of personnel that we
16 get with what they call the budget reset depends on that
17 year. And then we get a new count that starts July 1.

18 So, then for next year and the year following, God
19 forbid, when we're still doing this, we might have a whole
20 lot less people able to do what we need done.

21 So, let's say a ninety-day tolling agreement gives time
22 within which cases can be filed in the next statistical
23 year. I realize that's not a really solid reason, but it is
24 for us, and for us doing the work that we need to do to
25 provide the service that we want to provide for you all.

1 I hope you've found our Clerk's Office to be helpful
2 and cooperative. And we've tried to be sure that that's the
3 case. I want to be able to continue to have that sense of
4 assurance.

5 So, that's my pitch for a short term. And my same
6 pitch would be to the plaintiffs. Don't file junk. Take
7 your time. If the 90 days comes along to file -- 90 days is
8 long enough to think. But that's, that's all I have to say
9 about it and whatever you do.

10 Judge Stanley.

11 MAGISTRATE JUDGE STANLEY: There is another
12 statistical calendar which happens to be October 1 to
13 September 30, which is why I was thinking that 90 days would
14 actually be even a little bit more help to get us into
15 October, October the 11th, for example. Now, it's not as
16 significant as the July 1 to June 30, but it would be
17 helpful.

18 The other thing is, Mr. Garrard, do you have any idea
19 how many may be heading our way, --

20 MR. GARRARD: Your Honor, --

21 MAGISTRATE JUDGE STANLEY: -- how many additional?

22 MR. GARRARD: Your Honor, I can't give the Court
23 an accurate number, but I would be surprised if your numbers
24 over the next few months per month -- if I understand what
25 Kate has said to me, you're getting about 50 cases a month

1 currently. I would be surprised if that number did not
2 double or triple.

3 MAGISTRATE JUDGE STANLEY: All right. Well,
4 here's another thought. The clerk tells me that they are
5 obligated to file -- to assign a number and to process a
6 case the day it arrives. And there's not an even flow of
7 cases in, so that they may have hundreds on Wednesday and
8 not so many on Monday or a Friday. And -- which, of course,
9 it becomes really tough on the people who have the
10 responsibility of processing them.

11 If there is any way to even that out and to have some
12 cooperation, that would be so appreciated so that somebody
13 doesn't have to work until 10:00 at night, you know, without
14 really warning just because a whole bunch of lawyers decide
15 to file that day.

16 MR. GARRARD: We, we will certainly send that
17 message, Your Honor. What effect that sending of a message
18 will have, I don't know. But we will certainly send that.

19 And I would make this offer having heard what Your
20 Honors have said. If Ms. Jones or Ms. Binis or somebody
21 would be willing to at least work with us, we would see if
22 there is something we could come up with that might help
23 what the Court is talking about in the interim.

24 MS. JONES: I had not understood, Your Honor, when
25 you initially said what you were talking about was a 60- or

1 90-day period or something like that. And, and I am
2 confident that if that's what we're talking about, we could
3 probably figure out something to work around that.

4 JUDGE GOODWIN: I would sure appreciate it. And
5 Judge Stanley is right. If you could make it over to like
6 the middle of October, that gives us another thing. It's
7 just a pure statistical artificial deadline.

8 MS. JONES: I anticipate that we can figure
9 something out on that.

10 MR. GARRARD: We, we will endeavor to do that very
11 rapidly, Your Honor.

12 JUDGE GOODWIN: I appreciate that very much.
13 Again, it's entirely voluntary. I respect your clients'
14 decisions. And, so, whatever, whatever you can do would be
15 well received.

16 We have -- currently have trials set through February,
17 2014: AMS in December, Ethicon in January, and Boston
18 Scientific in February. I plan to add Bard back into the
19 trial schedule and I'm willing to set a trial beginning in
20 March or April of 2014, depending upon whether Bard is set
21 behind Boston Scientific, cases from the trial pools which
22 were not chosen as bellwethers in December, 2013, and
23 January and February of 2014.

24 That is to say, as I mentioned when I met with the Bard
25 people this morning, it seems to me like those are the

1 cases, the ones that haven't been tried but that have been
2 prepared then go in rotation and we keep on going.

3 Trial settings for 2014. Who wants to talk about that?

4 MR. GARRARD: We simply, Your Honor, were
5 requesting the court to go ahead, if you will, and say, for
6 example, the next Bard/Sofradim cases will be in March, and
7 then starting back over with rotation of AMS, J&J, Boston
8 Scientific, and then back to Bard for the rest of the year
9 so that we could be planning forward.

10 Our, our expectation on the non-Bard MDLs, as the Court
11 knows, we've already agreed upon bellwethers for the next
12 set of Bard/Sofradim cases. Our expectation from the
13 plaintiffs' side is exactly what Your Honor just said and,
14 that is, cases that are not reached, for example, with AMS
15 in December would then roll to the next setting.

16 JUDGE GOODWIN: The way that the cases are set now
17 is meant to be humane. That is to say, --

18 Which you won't recognize, Ms. Jones.

19 That is to say, I meant to set cases, try them, and
20 have a few days before we jump into the next one. There
21 could come a time, even if we set these dates -- this is
22 just a caution. There could come a time when it starts to
23 make sense to me just to keep rolling.

24 So, I'll set dates, but I'm not telling you that I
25 won't some day think it makes more sense just to stay in

1 trial until you've had enough, to be blunt.

2 But is his suggestion I just go ahead and set these
3 dates acceptable to this side of the room?

4 MS. BINIS: Your Honor, --

5 JUDGE GOODWIN: So agreeable. You know, I
6 mentioned to Ms. Moeller in the Bard meeting that she was so
7 quiet. And she remains that way. I'm very concerned.

8 MS. BINIS: Your Honor, --

9 JUDGE GOODWIN: Yes.

10 MS. BINIS: -- I'm afraid I can't remain so quiet.

11 JUDGE GOODWIN: Ms. Binis, I didn't expect you to.

12 MS. BINIS: I'm really trying, Your Honor. I
13 really am.

14 If I could just jump ahead a little bit to what I was
15 going to say on the Minnesota and Delaware consolidations.

16 JUDGE GOODWIN: Yes, uh-huh.

17 MS. BINIS: Recently, within the last 30 days,
18 we've been in both, both of those courts. And the
19 plaintiffs' lawyers in those courts have pushed very hard
20 for bellwether trial schedules in both those consolidations.

21 Now, those are the same plaintiffs' lawyers that are
22 here in the MDL. And what, what we have got, Your Honor, is
23 six bellwether cases against AMS in the year 2014.

24 So, we have two cases in Minnesota in June. We have
25 two cases in Minnesota in July. We have one case in

1 Delaware in July. And we have a case in Delaware in
2 September. Those are all bellwether cases. This is
3 completely separate from our individual trial calendar which
4 I've already shared with you for this year, but we have an
5 individual trial calendar for 2014 as well.

6 So, Your Honor, I'm, I'm simply saying this because
7 these are bellwether cases, because they are picked by the
8 same plaintiffs' lawyers that are in this litigation, and
9 because I just can't be in all those places at one time,
10 that this court take those cases into consideration.

11 JUDGE GOODWIN: Ms. Binis, I'm going to say
12 something that will not fall softly upon you.

13 I, probably more than any federal judge you know, has,
14 have in the past and continues to reach out to state judges,
15 some of whom are responsive, some of whom are not.

16 I talked to one state judge just this week.

17 Which one was that?

18 LAW CLERK FIFE: Judge Baca.

19 THE COURT: Judge Baca. I played phone tag with
20 another judge, and we'll get together in the next day or
21 two.

22 I'm reaching out to them and trying to work with them.
23 And, and in that sense, I am willing to try to accommodate
24 them. But I say this with all due respect and deference to
25 my state colleagues. It takes two to play.

1 Now, I've got 14,000 cases, and none of them have
2 14,000 cases. And I'm going to set my docket, if we don't
3 work and play well together, and I am going to expect
4 lawyers to show up.

5 MS. BINIS: I understand that, Your Honor. And I
6 do appreciate the efforts that you've made, seriously. I
7 guess what I'm suggesting here is it's more a matter of
8 coordination here among the parties than it is the court.

9 JUDGE GOODWIN: I would think so because I'm --
10 you know, I don't have any of you followed. None of you are
11 stalked.

12 On the other hand, I'm aware of which lawyers attend
13 most depositions and which lawyers are trying cases. And I
14 know it's a fairly small group of you. And eventually
15 you're all going to wear down to a little nub.

16 So, it seems to me that it would be wise to have
17 more -- have some further discussions about that. I don't
18 want to be in a position -- I don't want to be in a position
19 to roll overtop of a State Court or your law firm or a
20 plaintiffs' law firm and say, "You will be here. Your case
21 is going to trial on this date. I don't care if you've got
22 four state cases."

23 But if I don't get the cooperation, I don't have a
24 choice. That sounded meaner than I meant it to. I didn't
25 mean it to. I completely concur in your desire. The

1 plaintiffs should work with you to avoid that problem.

2 It is always the case in the MDLs and in mass torts
3 generally that plaintiffs like to go to other jurisdictions
4 and get another bite at the apple and get a different judge
5 and get a different opinion and get a different verdict and,
6 thereby, think they're gaining leverage. And sometimes they
7 do gain leverage because some of your clients get scared
8 off. And we just live in a real world.

9 On the other hand, the real big enchilada is all these
10 cases, not the few dozen that are out there.

11 So, I would encourage strongly the plaintiffs to work
12 cooperatively with counsel for the defendants to avoid the
13 very problems you're concerned about.

14 Did I sound a little nicer at the end?

15 MS. BINIS: You always sound nice, Your Honor.

16 JUDGE GOODWIN: Thank you.

17 I think, Ms. Binis, you also wanted to talk again about
18 innovative trial ideas or --

19 MR. MCCONNELL: Your Honor, I'm actually going to
20 address that.

21 THE COURT: Okay.

22 MR. MCCONNELL: We, we put that on the agenda as a
23 follow-up because I think Mr. Garrard --

24 THE COURT: Yeah.

25 MR. MCCONNELL: -- put that on the agenda the last

1 time. And I think he also had it listed in the plural,
2 innovative trial ideas. But I think the idea, singular,
3 that he mentioned at the time was this idea of multiple
4 juries.

5 I think Your Honor at the time of our last hearing
6 acknowledged the possibility, maybe even the probability,
7 that the defendants might not embrace that idea.

8 But we did have a conversation with Mr. Garrard, a very
9 pleasant conversation. It always is with him. And we
10 haven't been convinced about the merits of that. I think
11 it's consolidation really in another form. We dislike that
12 for all the obvious reasons.

13 But we didn't stop. We talked about some other ideas.
14 And I think both you and Judge Stanley talked about some
15 notions of a mock trial. It actually wasn't very mock
16 because I think you were talking about you doing it, --

17 THE COURT: Right.

18 MR. MCCONNELL: -- actually both sides and an
19 advisory jury. So, we, we talked about that a little bit.

20 I got the sense from Mr. Garrard that he wasn't going
21 to embrace that idea. And he can give you his own reasons
22 for that. But there were a lot of other ideas too. I just
23 wanted to bring you up-to-date on that.

24 We were going to talk a little bit about things to make
25 trials move faster. I have to admit at the time I didn't

1 realize that you already had some things in place for the
2 trials, the idea of time trials. But I think the very times
3 that we were thinking about I think are consistent with what
4 you've done.

5 We think judicious use, if I can talk about us being
6 judicious, judicious use of *Daubert* motions in these cases,
7 I think issues of biocompatibility. There may be things
8 that we can separate the wheat from the chaff and make these
9 trials a little bit leaner.

10 And then we had some other ideas that we, we didn't get
11 too far on. And they might not sound like things that make
12 cases go faster, but we talked about adding things like
13 juror questions or mini summaries after witnesses or at the
14 end of the day, although in my experience they actually can
15 make a case go faster because, you know, you're sort of more
16 confident that the jury is engaged and understands what's
17 going on and maybe -- we all know that these cases get
18 over-tried; too many witnesses, too many questions of the
19 witnesses. And maybe there are things that can help us
20 avoid that, but I just wanted to bring you up-to-date.

21 So, we've talked about it. I think we're going to
22 continue to talk about it. It was a very good dialogue.
23 And if there are any other suggestions from the Court, we're
24 going to try to actually be innovative.

25 JUDGE GOODWIN: Well, I've said this before, but

1 I'll repeat it for those of you who haven't been here. In
2 my prior life, I was a trial lawyer for 25 years and I
3 tried -- I actually tried cases. And I've been doing this
4 for 18 or 19 years. And I know all the arguments. I
5 mentioned one this morning.

6 When I say six days for each side, the plaintiffs say,
7 "Oh, my God, that's not fair. We have, we have the burden
8 of proof. We have to build the house. All they have to do
9 is take potshots at us and tear it down."

10 And that's why in the order there is a little clause or
11 thing that says I'm the person that's going to apply these
12 rules in a flexible way. I'm not going to let anybody take
13 advantage of anybody.

14 Ideas with regard to over-trying the cases, I'm not
15 Judge Ito. And some of you are old enough to remember that.
16 I am. Maybe we could have The Dancing Itos make a real
17 appearance. We won't over-try it.

18 I notice I have -- or Kate notices that I have ten
19 motions on *Daubert* that came in today. That's a lot. So --
20 I haven't looked at them, so I won't make any further
21 comment.

22 But I compliment the lawyers in each of the cases.
23 There's been one or two cases where you've fought
24 unnecessarily. But most of the, most of the cases I applaud
25 the cooperation I'm getting from lawyers.

1 While I think of it, on a different subject, I want to
2 encourage local counsel and liaison counsel and lead counsel
3 for the plaintiffs to keep liaison counsel up-to-date,
4 involved, and informed. And I want to encourage them to
5 keep counsel in the individual cases informed.

6 There will come a time that it's very important that
7 that universe of lawyers out there, or at least some of them
8 that have an interest, will need to know. And I feel like,
9 without any evidence, that the liaison counsel hasn't been
10 as involved in this case as they have in my previous MDLs.
11 And I would ask you to work a little harder to see that they
12 are.

13 As to innovative ideas, I'm open. I'm open to
14 innovative ideas. I'm open to focus groups. I'm open to --
15 joint focus groups. I'm open to focus groups with a judge
16 involved, Judge Eifert or me. I'm open to most anything
17 that the parties seem to think might help.

18 I'm open to very creative things like, okay, we'll have
19 one just for fun and, and whatever happens, there's --
20 nothing said on that record may be used ever again, but it's
21 just for our information. I'm open to all kinds of ideas.

22 All of you now, the big firms and the big plaintiffs'
23 firms, use mock trials a lot. And all of you have seen that
24 you get disparate results from what you get when you
25 actually go to trial. Sometimes you get a good prediction.

1 But it is very useful, at least from the defense side,
2 I think, in talking to your clients, especially if they
3 watch one of these juries talk about your case. But,
4 anyway, I'm open.

5 And I, I didn't mean to confine it to Mr. Garrard's
6 idea of trying multiple cases at the same time. I meant it
7 for many other things. And all I -- I didn't mean to reject
8 Mr. Garrard's idea in that regard. I just meant to put it
9 off. So, --

10 MR. GARRARD: Your Honor, we have had that
11 discussion. And I applaud AMS for, frankly, reaching out to
12 further the discussions. And we intend to have some more
13 discussions. And, and I don't intend to respond to
14 suggestions.

15 But the one thing that we continually hear is that the
16 defendants need more information about the value of cases.
17 And there are multiple ways to do that. And I don't think
18 from our side we would necessarily be adverse to some type
19 of procedure by which they could learn what juries would
20 think about ten cases or whatever, a mock jury.

21 But the problem from our side is that if we go down
22 that road, there's got to be some skin in the game from
23 their side. There's got to be that this is leading us
24 somewhere. There's got to be that if we get this kind of
25 information, then we are in a position to arrive at what

1 ultimately has to be a business solution for them and,
2 frankly, for us.

3 So, that's, that's the thing that's difficult to figure
4 out, how there is skin in the game from their side that
5 looks like if we go through these efforts of a mock trial or
6 advisory juries or whatever that it's going to lead us
7 somewhere.

8 JUDGE GOODWIN: Uh-huh. I understand. But
9 there's no question in my mind that their obligation -- you
10 can sit down. There is no, no doubt in my mind that their
11 obligation to inform their clients as to the progress of the
12 trial and the status of the trial means that those kinds of
13 things don't have an impact and don't lead somewhere.

14 They, of necessity, lead somewhere because they, in
15 performing their duties as counselors of law, have to tell
16 their clients and have to advise their clients.

17 So -- and I'll just wander off again. And then I'll
18 get out of here and let Judge Stanley and Judge Eifert deal
19 with you.

20 But too many lawyers on both sides of the bar have
21 abandoned their role as counselors at law and have just
22 become combatants, advocates. And your role to tell your
23 client, "You don't have a case," or, "You do have a case,"
24 or, "This is a good case," or, "This is a bad case," or all
25 of the stuff in between is a very important role that

1 lawyers play in society.

2 And I have a sixty-minute speech which I'll share with
3 all of you about the problem we have today with a legal
4 system that's more about "let's make a deal" than "let's
5 find the truth."

6 I like the legal system that is founded upon the common
7 law. I like the common law that develops through trials and
8 through judgments rendered. That doesn't mean that I don't
9 like settlements, but I like informed settlements.

10 If I keep going, it will get to be longer. I -- to the
11 end of making informed judgments about what you tell your
12 clients and how you counsel your clients, I'll cooperate in
13 every way that I can and devote whatever effort you ask of
14 me to participate in those endeavors.

15 Now, the next topic is AMS's motion to strike
16 bellwether cases. I've read the arguments presented by the
17 parties.

18 Does either party wish to add anything not presented in
19 the papers?

20 Yes, ma'am.

21 MS. FITZPATRICK: Your Honor, Fidelma Fitzpatrick
22 for the plaintiffs.

23 The one thing that I would like to add, Your Honor,
24 that is not in the papers themselves is we had a hearing in
25 Delaware -- I think we're going to update you on this

1 later -- where we were looking for the composition of the
2 bellwether pool. And we were also looking to put in a
3 scheduling order to get to trial, as Ms. Binis mentioned.

4 And what was very instructive about what happened in
5 that proceeding was that the position taken by AMS in
6 Delaware as to what constitutes a representative pool is
7 very different than the position that has been taken by AMS
8 in this particular court.

9 Here while they're arguing that it should be an SUI and
10 SUI only pool and that that is limited to two particular
11 products, the Monarch and the Spare, in Delaware the AMS
12 took a position that it wanted a much more extensive pool;
13 that in order to be properly representative of the entire
14 body of women who were before that court -- and before that
15 court is somewhere between 250 and 300 cases total, so a
16 very small fraction of what we have here -- that in order to
17 be properly representative, it had to include all of the
18 conditions and all of the products by AMS that were there.
19 And it's a very stark contrast and there are two points that
20 I wanted to make in comparison to that.

21 As Your Honor noted, this is where we have the bulk of
22 the cases. At this juncture, to limit it to an SUI only
23 trial and certainly -- an SUI only bellwether grouping does
24 a disservice in two ways.

25 First of all, it excludes the approximately 40 percent

1 of women who are before this court who do have a POP
2 condition and whose cases cannot be resolved until we deal
3 with the POP cases and have a POP trial.

4 Secondly, it puts the, the MDL in a different position
5 certainly than the State Court in Delaware and the State
6 Court in Minnesota, both of which will be considering POP
7 trials and going forward for their bellwether pools.

8 And the third thing that it does, Your Honor, and this
9 follows up on what you were talking about this morning, is
10 we will be looping back into another AMS trial that's going
11 to come up, be it sometime in the spring of next year.

12 If we exclude these POP cases from this bellwether
13 pool, then we are essentially ensuring that no POP case is
14 going to be reached whatsoever until a very significant
15 period of time from now which, again, compromises the
16 ability of 40 percent of women to, to deal with their case.

17 The last point, Your Honor, that I want to bring up is
18 we had mentioned in our papers the issue of POP discovery
19 that's already been done, that that case is slightly farther
20 down the line.

21 Since we've put in our papers, and you'll be hearing
22 this a little bit later on in connection with the discovery
23 motions that are going to be heard, we have very serious
24 issues that have come up based on the 30(b)(6) deposition
25 that was taken a couple of days ago in this case and had

1 been ordered by Your Honor concerning the timing of
2 discovery that has been done, the scope of discovery that
3 has been done, the comprehensiveness of the discovery that's
4 been done, and our ability to get depositions.

5 And all of those issues and those discovery delays
6 compound our concerns about some of the SUI trials and some
7 of the issues that we're getting.

8 Now may not be the time to decide it, certainly, until
9 we see how things unfold in 30 or 60 days until we see what
10 happens with discovery. But I think it's really important
11 for the purpose of keeping that December trial date that we
12 have the option of that POP trial, especially in light of
13 the discovery issues that we're going to be talking about
14 later and the possibility that while Your Honor may have
15 indicated an interest in doing an SUI trial, that the
16 particular circumstances of this case and the particular
17 circumstances of how this litigation has unfolded, it may
18 turn out later that Your Honor might decide that a POP case
19 might be more appropriate. If we don't have any POP
20 bellwethers now, we have lost that ability to do that trial
21 date and move forward.

22 So, those are the only things that I wanted to add to
23 that, Your Honor.

24 JUDGE GOODWIN: Anybody feel obligated to answer?

25 MS. BINIS: Your Honor, as to Delaware, all I can

1 say about that is we have not decided on the Delaware trial
2 pool. We have not even presented the judge with a proposal
3 for how to pick the trial pool.

4 And the only disagreement in Delaware was the
5 plaintiffs wanted eight bellwether picks and we wanted more
6 than that. That was the issue of the Delaware pool. It was
7 not an issue of which case would be tried. And, certainly,
8 because there are more SUI cases there than anywhere, I
9 would argue that SUI should be tried there as well.

10 But, but what's most important here for our bellwether
11 cases is just what Your Honor was just talking about. And,
12 that is, that we get to the truth of the matter.

13 I don't think it's any surprise to this Court that the
14 defendants view SUI cases very differently than they view
15 POP cases. And that's for a lot of different reasons.

16 The FDA treats them differently. Doctors treat them
17 differently. Medical societies treat them differently. And
18 even plaintiffs' experts treat them differently.

19 And we do, in our minds, value SUI cases, which are the
20 majority of the inventory in this court, very differently
21 than we view POP cases. And for that reason, it was
22 important to us -- and we talked about this with Your Honor
23 before -- to try an SUI case first because we do believe
24 that that will best inform the defendants and the plaintiffs
25 about the value of the inventory.

1 Your Honor was very clear in your order as to how we
2 were to pick our bellwether cases. Single product cases --
3 and there was, there was a good amount of discovery about
4 this and we went back to the transcript and looked at it.
5 It was single product cases. And you said that an SUI case
6 would be tried first. And that is how we approached our
7 bellwether picks. We were, therefore, quite surprised to
8 see the plaintiffs had, in contradiction to that, picked
9 multi-product cases and POP cases.

10 I really think that to get down to representative
11 cases, two of which could be tried in December, we need this
12 pool of 30 to channel down to that pool of five. I do not
13 think that that's an outrageous number of cases. I think
14 that that's what we're looking for is true representation,
15 and that if there is going to be a POP case tried later, we
16 can do another pool and we can narrow it down to a
17 representative POP case too. I don't, I don't think that
18 those two things are inconsistent.

19 So, for those reasons, we feel that plaintiffs
20 basically ignored the direction Your Honor had given us.
21 And that is why we're asking to strike those POP cases.

22 JUDGE GOODWIN: It is not news to me that both
23 sides -- I don't remember which defendants and which
24 plaintiffs -- have used the bellwether selection process to
25 try to manipulate things a little. That doesn't come as a

1 great shock to me.

2 But I -- and I've considered the arguments that I've
3 heard from you and have read. But I remain convinced that I
4 set up a fair process where the parties were to select cases
5 that each party filed was representative.

6 I indicated clearly and consistently what I intended to
7 pick. I haven't changed my mind. The motion to strike is
8 denied. I haven't changed my mind. This is -- to me, this
9 is like re-arguing something that you already know I'm going
10 to do, or putting things forward that ask me to re-litigate
11 something that I've already announced. So, be that as it
12 may, the motion is denied.

13 Next is the update on PTO 37. Who wants to report on
14 that?

15 MS. BINIS: May I just ask -- I'm sorry, Your
16 Honor. I didn't mean to interrupt you.

17 THE COURT: Yeah, uh-huh.

18 MS. BINIS: But may I ask for a clarification?

19 JUDGE GOODWIN: Sure.

20 MS. BINIS: Does that mean, Your Honor, that in
21 the five trial picks that we end up with, one of the
22 plaintiffs' POP cases may be in that five trial pick?

23 JUDGE GOODWIN: It means whatever ones I pick will
24 be there because I gave everybody a fair chance and I'm
25 aware of everybody's arguments. But I indicated what I was

1 going to do.

2 MS. BINIS: Your Honor, we did not know that you
3 were going to allow multi-product cases. So, I'm, I'm
4 wondering --

5 JUDGE GOODWIN: I didn't say I was going to pick a
6 multi-product case. Don't you understand that?

7 MS. BINIS: Yes, Your Honor, I do. Thank you.

8 JUDGE GOODWIN: Okay. I can't control what you
9 select. I can control what I pick.

10 37, update on Delaware and Minnesota consolidated
11 cases. I've heard part of that. Who wants to fill me in on
12 the rest of it?

13 MS. BINIS: Yes, Your Honor.

14 All I wanted to tell Your Honor was this was the week
15 in which the plaintiff fact sheet and the defendant fact
16 sheet forms were to be exchanged according to PTO 37.

17 Those forms have been exchanged short one. There's one
18 plaintiff fact sheet that was not exchanged this week. And
19 we talked to that plaintiff and we agreed with them to give
20 them a ten-day extension. So, I'm expecting that we will
21 get it and I just wanted the Court to understand --

22 THE COURT: Great.

23 MS. BINIS: -- where we were in the process.

24 JUDGE GOODWIN: Thank you very much.

25 Anything else to say about the Delaware and Minnesota

1 consolidated cases?

2 MS. BINIS: No, Your Honor. I wanted to tell
3 you -- explain the trial schedule.

4 JUDGE GOODWIN: Boston Scientific, there's a
5 motion for leave to amend the complaint to add defendants.
6 I've reached a decision on this motion. I will issue an
7 order within the next five days. The motion is denied.

8 On MDL 2327, Ethicon, there's a stipulation dealing
9 with foreign entities, J&J, Ethicon, joint and several
10 liability. Who's going to talk about that?

11 MR. CARTMELL: Your Honor, Tom Cartmell on behalf
12 of the plaintiffs in the Ethicon case.

13 You may recall early on we were talking about naming
14 multiple defendants that were from foreign countries,
15 Ethicon Sarl and some other foreign defendants, because
16 they're listed as the legal manufacturer or they have some
17 involvement with the manufacture or marketing the products.

18 We agreed that we would not do that at that time.
19 We've been working together to try to come to an agreement.
20 We don't have an agreement yet, although Ms. Jones has been
21 very busy. And we talked prior to today, and it looks like
22 she's going to be talking to her client.

23 There's really two issues. The other issue has to do
24 with a stipulation related to Ethicon and J&J essentially
25 being one in the same for purposes of trial because our

1 concern is when we get to trial and there's multiple
2 manufacturers discussed, as we said, it will be confusing
3 for the jury and it, it will be a problem for us.

4 We need to know whether or not we need to do extensive
5 discovery to try to prove that J&J is responsible for the
6 acts of its subsidiaries or those types of things. We know
7 that they agreed to stipulate to that in New Jersey, and
8 we're hopeful that they'll agree to stipulate to that here
9 as well. And Ms. Jones said that she's going to be talking
10 to her client. So, we're hopeful we don't have to --

11 THE COURT: So, your forecast is for sunny
12 weather?

13 MR. CARTMELL: My forecast is sunny weather, yes.

14 JUDGE GOODWIN: Okay.

15 MS. JONES: Your Honor, Mr. Cartmell is accurate
16 that I think that we will be able to resolve this issue
17 without problem. It is a complicated issue --

18 THE COURT: Right.

19 MS. JONES: -- and it involves --

20 THE COURT: Which you've dealt with before.

21 MS. JONES: -- significant high people at the
22 client that we need a little bit of time, Your Honor. I
23 think it will resolve itself.

24 JUDGE GOODWIN: Sure.

25 MR. CARTMELL: And, Your Honor, that, that

1 actually takes care of the second issue as well. Those are
2 tied together.

3 JUDGE GOODWIN: All right. Did somebody want to
4 talk about amendments to the master complaint? Is that what
5 you're talking about?

6 MR. CARTMELL: Yeah. We would -- if we couldn't
7 come to a stipulation, then we were talking about an
8 amendment.

9 JUDGE GOODWIN: I understand. Okay.

10 The final topic for Ethicon, I think, is New Jersey
11 update. Anything to report on that?

12 MS. JONES: No, sir, absolutely not.

13 JUDGE GOODWIN: All right.

14 MS. JONES: I will say, Your Honor, that there are
15 no current trial settings at this stage.

16 JUDGE GOODWIN: Okay.

17 MS. JONES: Would you like something else?

18 JUDGE GOODWIN: No, no, no. I, I just thought I
19 would mention Judge Higbee was invited to the Multi-District
20 Litigation Conference in Palm Beach and attended, and spoke
21 on federal-state cooperation. Anyway --

22 All right, let's go to Coloplast. It's nice to see
23 Coloplast again.

24 Who will report on the topic of agreed stipulation and
25 service of process, whatever?

1 MR. SALIM: Your Honor, Robert Salim for the
2 plaintiffs. We have agreed, of course, on a tolling
3 agreement and we've agreed on a fact sheet. It's working
4 extremely well because the defendants have set up a web
5 portal where the plaintiffs can send their medical records
6 in. And then we were doing well on identifying products.
7 And a lot of the cases were not with the Coloplast
8 defendants, and they're pointing that out. That's working
9 well.

10 We've talked about the stipulation on the foreign
11 defendants. We have a draft that we have exchanged, and we
12 expect to agree on it by the end of today.

13 But the process itself, Your Honor, in line with why we
14 believe the tolling would be great on other defendants, it's
15 eliminating a lot of lawsuits once the defendants look at
16 it. They're pointing out to the plaintiffs that either you
17 have the wrong product or you have multiple products. And
18 then the plaintiffs are able to send the medical records
19 directly to the defendants.

20 And, so, we're getting a great early evaluation on the
21 significant number of cases without them even having to be
22 filed. So, it's working very well.

23 JUDGE GOODWIN: So, you, you were an advocate for
24 early case assessment.

25 MR. SALIM: Yes, Your Honor, and it's actually

1 working.

2 JUDGE GOODWIN: I met with the parties in Bard
3 this morning regarding pre-trial matters, and I think we've
4 dealt with everything.

5 Is there anything else that we need to do?

6 MR. GARRARD: No, sir.

7 JUDGE GOODWIN: I will conclude my part of this
8 conference and turn things over to Judge Stanley and Judge
9 Eifert. But before I do, I invite you all to adjourn to the
10 lobby for lemonade and cookies in honor of Judge Stanley's
11 retirement at the conclusion of the status conference.
12 Judge Stanley and Judge Eifert will reconvene here this
13 afternoon at 1:00 for a hearing on AMS's discovery motions.

14 With that, I'll turn the bench over to them. It's nice
15 to see all of you again. On behalf of J.W. Marriott, I want
16 to thank you, and Embassy Suites and the Charleston Chamber
17 of Commerce.

18 I -- as I said, I've been in this business for a long
19 time. I am very pleased to be the Judge in this case with
20 so many good lawyers. I am very pleased about this. I hope
21 it, hope it continues.

22 (Whereupon, District Judge Joseph R. Goodwin exited the
23 courtroom, after which the following occurred:)

24 MAGISTRATE JUDGE STANLEY: Please be seated.

25 The first issue of general interest appears to be how

1 the defendants are designating documents as confidential.
2 And I guess the plaintiffs may think that too many are being
3 designated. I'm not sure who offered this.

4 MR. GARRARD: I offered it, Your Honor. And I
5 don't have a solution, but we have a problem that some of
6 the defendants are designating virtually every document they
7 produce as confidential.

8 And I've raised it before and I guess what I'm really
9 asking is some approach whereby defendants re-look at what
10 they are designating and go back and designate or
11 un-designate in accordance with the Federal Rules.

12 I know in my office we are getting ready to respond to
13 whatever the *Daubert* motions are and whatever substantive
14 motions may come in relation to the Bard cases. But as we
15 are preparing that, we keep looking and knowing that we need
16 to utilize documents that have been produced.

17 And I have talked to my briefers and said, "Well, Judge
18 Stanley advised last time paraphrase, cite to the Bates
19 number, and then provide the documents to the court." And
20 we're going to attempt to do that as best we can, although
21 they come back at me and say, "Henry, when we do that, some
22 of the import of what we're trying to say gets lost."

23 And we just have a practical problem here that there
24 is, in fact, a gross over-designation of documents as
25 confidential.

1 There's a second problem which is arising. And back
2 when the formation of the other MDLs was coming about, we
3 had some discussion about why that would be good to put it
4 all in this court. And that is this:

5 As we are doing depositions in certain of the cases --
6 and I'll use Bard as an example right now. When we are
7 doing depositions of some of the deponents, it becomes clear
8 as we study how to do the deposition that there are
9 documents that have been produced in the other MDLs that
10 would be appropriate or relevant to use in the Bard MDL.

11 Now, I had that problem a week or so ago and I
12 communicated with Ms. Jacobs and Ms. Jones and we worked out
13 a temporary way that we could utilize some documents if we
14 wanted to.

15 But I think we need some directive from the court,
16 perhaps an order from the court that allows us to use
17 documents across MDLs because the way the protective orders
18 read right now is that you are limited to the utilization of
19 Ethicon-produced documents in the Ethicon MDL or
20 Bard-produced documents in the Bard MDL.

21 As an example of documents I'd be talking about, when
22 you go through the databases, you'll find where Bard says
23 negative things about J&J products or J&J says negative
24 things about Bard products, and it's all intertwined.

25 And, so, we are requesting that the court allow us to

1 potentially submit an order or the court verbally issue an
2 order that says that we can use documents across the MDLs so
3 long as we keep them confidential within the MDLs.

4 I think the exception would be within the protective
5 orders there is a category of "highly confidential" or -- I
6 can't remember exactly what the description is. That
7 perhaps should, should be excepted such that if you need to
8 use "highly confidential," or think you do, you need to
9 notify the affected producer.

10 And I don't have a problem with that. But the general,
11 generally designated confidential documents, we need to be
12 able to use them across the MDLs. And then we also need
13 some vehicle by which the confidentiality designations get
14 de-designated.

15 I know this court does not want us to file motions that
16 say, "Judge Stanley or Judge Eifert, look at eleven million
17 documents that have been over-designated." We don't want to
18 do that either. But we do have that problem and we need, we
19 need some, some help from the court.

20 MAGISTRATE JUDGE STANLEY: All right.

21 MR. NORTH: Your Honor, --

22 MAGISTRATE JUDGE STANLEY: Mr. North.

23 MR. NORTH: -- if I could address that briefly, as
24 far as confidentiality goes, I think the Court will remember
25 that at the beginning of this litigation, we produced an

1 enormous amount of documents on behalf of Bard, what I hope
2 was fairly expeditiously. And in doing so, to be able to do
3 it that quickly, yes, there was some over-designation, I'm
4 sure, by our vendors.

5 We've continued to work with Mr. Garrard's firm on any
6 challenges they have. Two of my partners have spent several
7 days talking and in-person meetings with Mr. Garrard's
8 partners to work that out. And we are willing to continue
9 to do that.

10 As far as the use of the documents in other MDLs, I
11 believe this is something the parties all together need to
12 spend some time and maybe prepare an order for the Court's
13 consideration.

14 What we're most concerned about is notice. For
15 example, -- and I, I couldn't speak for Ms. Jones or Ms.
16 Jacobs. But one of our urogynecology experts, Dr. Vincent
17 Lucente, was deposed by the plaintiffs, not Mr. Garrard, on
18 Friday. It was an eight-hour -- seven- to eight-hour
19 deposition and it's not concluded.

20 Dr. Lucente had done a lot of consulting work in the
21 development of the Prolift product for Johnson & Johnson.
22 My understanding is -- I wasn't there. My colleague,
23 Ms. Cohen was -- that 80 percent of the questioning was
24 concerning his work for Johnson & Johnson.

25 I can't speak, again, for Ms. Jones and Ms. Jacobs, but

1 if the reverse had been true, I would have wanted notice and
2 an opportunity to be there because, otherwise, we're not all
3 going to each other's depositions in the individuals MDLs.

4 So, my suggestion would be that all the parties get
5 together, see if we can come up with some sort of order that
6 would give us protection against those sorts of events from
7 happening.

8 MAGISTRATE JUDGE STANLEY: All right.

9 Yes, Ms. Jones.

10 MS. JONES: I would simply second what counsel for
11 Bard is saying. I mean, we, we got a call and tried to work
12 things out. And we basically, not knowing what the
13 documents were at the time, said, you know, "We'll agree to
14 this if we limit this to attorneys' eyes only until we have
15 some idea of what documents that are being used," because
16 clearly there are -- we are all competitors and there are,
17 in fact, some documents that are -- have the potential to be
18 very sensitive.

19 And while I think we can probably work things out, this
20 is -- I mean, we, we did get a report that we -- that the
21 deposition did not go as we had been led to believe in terms
22 of what we thought, how we thought the documents were going
23 to be used.

24 And I don't have any problem with sitting down and
25 trying to work something out or an order that is agreeable

1 to all of the defendants. But I do think we need a little
2 bit of time to, to see if we can work the terms out.

3 MAGISTRATE JUDGE STANLEY: All right.

4 Does Boston want to chime in here?

5 MR. STRONGMAN: I would just simply echo that I'm
6 more than willing to sit down and try to figure out a
7 solution. I'm certainly -- we're in the same position. We
8 had a deposition happen where a document was used that was
9 an Ethicon-produced document in one of our depositions
10 recently. It wasn't a big issue.

11 But in terms of -- certainly, we don't have access to
12 those documents before the deposition. There's certainly no
13 foundation, not a document involved with our witness in any
14 regard. But, of course, as with everything, we're more than
15 happy to sit down and try to see if there's a solution.

16 MAGISTRATE JUDGE STANLEY: Does AMS wish to
17 respond?

18 MR. MCCONNELL: No. We're in accord with the
19 defendants. We agree.

20 MAGISTRATE JUDGE STANLEY: And Coloplast?

21 MR. KREPS: Same, Your Honor. We are certainly
22 willing to work that out. Of course, we're not yet in the
23 stage of producing documents.

24 MAGISTRATE JUDGE STANLEY: Before I hear from Mr.
25 Garrard, as Ms. Jones pointed out, you are competitors.

1 And, so, therefore your clients may believe that there are
2 aspects of their particular documents that they don't want
3 the competitors to see. And, yet, of course the nature of
4 competition is that your sales reps are telling the
5 surgeons, "Oh, you don't want another product. You want my
6 product and this is why."

7 And, so, there's, there's really two different sides to
8 that particular coin. Correct? I mean, is that a fair
9 assessment?

10 MR. NORTH: Yes.

11 MAGISTRATE JUDGE STANLEY: Okay. Now, with
12 respect to, for example, Ethicon's documents, I'm sure that
13 there was a vast body of documents which were admitted into
14 evidence. And what if -- New Jersey State Court and, of
15 course, anybody has access to those. And they are no longer
16 confidential to anybody. And the same thing is going to
17 happen with our trials. Bard's documents are going to be
18 admitted into evidence.

19 So, as you -- of course, we encourage you to work out
20 the problem. That is obviously going to pose some tricky
21 issues with your clients and with opposing counsel.

22 Let me just say that in my experience with
23 over-designation of confidentiality that before people start
24 trying to offer documents into evidence or in support of a
25 motion, we judges don't really care very much. So long as

1 the documents keep moving, you can designate them almost
2 anything and it's not going to be any problem for us.

3 The problem is if you're trying to withhold stuff from
4 the public record or prevent a party from being an advocate
5 for their client. And at that point, you are going to run
6 headlong into an extremely high wall that the district judge
7 presiding over these cases sets by local rule, by 26, Rule
8 26 of the Federal Rules, that you have to meet a very high
9 standard to keep your documents off the public record.

10 And I believe that that wall may be even higher in
11 bellwether cases because it's not just simply the resolution
12 of a private dispute. This is truly an issue of national
13 implication. So, that will just give you a few items to
14 think about.

15 Mr. Garrard, now do you wish to reply?

16 MR. GARRARD: The only comment I want to make,
17 Your Honor, is what Mr. North is suggesting that we
18 essentially tell them our strategy in the deposition before
19 we're taking the deposition certainly invades our
20 lawyer/client work product, et cetera, and is not something
21 that is doable.

22 MAGISTRATE JUDGE STANLEY: How is this different
23 from the prior hearing that we had when you offered to
24 provide documents to a witness 48 hours in advance?

25 MR. GARRARD: What Your Honor ruled was that for

1 treating physicians that we had to notify the other side of
2 documents that we were going to -- I can't remember whether
3 it was had produced to the doctor or were utilized by the
4 treating doctor.

5 MAGISTRATE JUDGE STANLEY: So, that's just
6 treating physicians.

7 MR. GARRARD: Yes, ma'am.

8 MAGISTRATE JUDGE STANLEY: That was just your
9 offer. It wasn't --

10 MR. GARRARD: It wasn't across the board.

11 MAGISTRATE JUDGE STANLEY: And it wasn't --

12 MR. GARRARD: It was just that. The, the doctor
13 that Ms. Jones is referring to, or Richard is referring to
14 was a designated expert for the defendants.

15 And my recollection, Christy, is that we didn't use any
16 of your documents in the deposition. And there's no doubt
17 that there was examination about what he had done with, with
18 Johnson & Johnson, but I don't think any documents were
19 utilized in the deposition.

20 But the thing we can't do is tell Christy or Richard or
21 Barbara or any of them that, "Here's our strategy of taking
22 a deposition." And, so, that we will resist. If there's
23 some way that there's language that we can work out so that
24 cross utilization of documents can be done, that's fine.

25 But it is a significant issue and it's going to be a

1 bigger issue as we go forward because Your Honor is correct
2 that in marketing, for example, Bard says, "You need to use
3 our multi-product because Ethicon's prolapse product has too
4 much mesh or the pores are too small or whatever else."
5 There's truly nothing confidential about that. But it's
6 matters that we need to be able to cross utilize.

7 MAGISTRATE JUDGE EIFERT: I'm just -- you know, I
8 think you go back to the primary issue, which is the
9 over-designation of these things as confidential because if
10 you didn't have that confidential marking on them, you could
11 use them at the depositions.

12 So, I don't know if the answer is to make motions to
13 de-designate. I understand what you're saying. That might
14 be eleven million documents. And I don't really want to
15 look at eleven million documents.

16 But I think maybe there needs to be some cooperation
17 and some work on getting some of these now that you know you
18 may want to use voluntarily de-designated as confidential
19 without -- I understand your point about not wanting to give
20 your strategy over in advance of the deposition, but I don't
21 know how you're going to get a very good deposition if
22 you're using documents that this expert's not looked at in
23 years and years and years. So, I mean, I think there's got
24 to be some give and take there probably.

25 MR. GARRARD: Yes, Your Honor.

1 MAGISTRATE JUDGE STANLEY: To the extent that
2 you-all negotiate a procedure for using confidential
3 documents either in a different MDL or using confidential
4 documents in a particular MDL that you want to use in court,
5 I think it would be a good idea if you negotiate this as an
6 amendment to the existing protective order and/or an
7 amendment to the existing deposition protocol so that the
8 changes are in one document rather than some supplemental
9 document which would make it more difficult for people who
10 are trying to follow it.

11 All right. I'm assuming that the parties have not
12 resolved the AMS discovery disputes that are set for 1:00.

13 MR. MCCONNELL: I think we have resolved some to
14 some extent. Maybe we could talk about that for a second,
15 the deposition issues.

16 MS. FITZPATRICK: We, we are working on that, Your
17 Honor. And I think that there may be some things that we
18 might be able to present to you that we would like to have
19 either reduced to an agreed-to order or court order. But
20 there will be other issues that are still in dispute,
21 especially, as I mentioned, given the deposition that
22 happened this week.

23 MAGISTRATE JUDGE STANLEY: Okay. Well, of course,
24 anybody who wants to attend that hearing at 1:00, you're
25 more than welcome. We'll be here.

1 Now, there are some agenda issues from Ethicon on
2 narrowing of products discovery and production of outside
3 U.S. documents.

4 MR. CARTMELL: Your Honor's last -- at the last,
5 the last hearing we mentioned that we were going to discuss
6 with Ethicon the idea of maybe narrowing the product
7 discovery to a certain number of products as we go forward
8 under this DCO and prepare for trial.

9 We have done that and, and we're at an impasse.
10 They're unwilling to do that. And I'll let Ms. Jones tell
11 you the reasons for that.

12 But essentially I think it has to do with they don't
13 want to produce witnesses more than once. And if we come
14 back later with other products, because of the witnesses --
15 many of them have to do with the same products -- we may
16 have to do that.

17 But -- and I hesitated about bringing this up today
18 without a written motion, but our concern has been that we
19 have about four months to do 50 or 60 depositions. We're on
20 a fast track. And if we filed a formal motion, we might be
21 a month down the line.

22 So, I was hoping to get some guidance from the Court
23 today, or you may say that you want us to file something
24 specifically and that's okay. But if you don't mind, I'd
25 like to give a little more background about the issue and

1 how it's sort of affecting the discovery at this point.

2 The issue is in the Ethicon case there are seven TVT
3 sling products that are at issue. And, really, six of them
4 are going to be discovered heavily. One is not so important
5 because it has to do with tools and it's likely not going to
6 affect many cases.

7 There are also three POP, or pelvic organ prolapse,
8 products that have been discovered, some in New Jersey;
9 really, the Prolift product. And then there's two others,
10 the Prosima product and the Prolift+M product, that really
11 have not been discovered much in New Jersey.

12 We are, you know, satisfied --

13 MAGISTRATE JUDGE STANLEY: No, wait. I was -- I
14 got a little confused.

15 MR. CARTMELL: Okay.

16 MAGISTRATE JUDGE STANLEY: You had three POP
17 products.

18 MR. CARTMELL: That's right.

19 MAGISTRATE JUDGE STANLEY: And then you said there
20 were two more. Or is that -- were you speaking of two that
21 were within the three?

22 MR. CARTMELL: Within the three, I'm sorry. Yeah,
23 the Prolift and the -- excuse me. The Prolift+M and the
24 Proxima are POP products that really haven't been discovered
25 a whole lot in New Jersey because the first bellwether in

1 New Jersey was a Prolift, was a Prolift case.

2 MAGISTRATE JUDGE STANLEY: Right.

3 MR. CARTMELL: So, so, a lot of the, the Prolift
4 discovery's been done in New Jersey. We have debated about
5 how much needs to be done now given the, the Court's
6 discussion about what the likely first bellwether is.

7 However, we feel -- still feel like we need to do
8 Prolift discovery just in case it is a Prolift and for the
9 future of all those products.

10 So, essentially what we're talking about doing right
11 now is discovering ten or nine products before the January
12 trial date.

13 We approached them about maybe reducing the number of
14 TVT cases or slings being discovered right now to three:
15 The TVT, the TVT-O, and the TVT-S. And those three sling
16 products probably make up I think greater than 90 percent of
17 the sling cases that are currently pending in, in the MDL.

18 The other two or three, the Abbrevio, the Exact, and the
19 AA, are a very small percentage of the cases.

20 So, that's really the issue. The effect that it's had
21 so far on us is essentially we're, we're behind. We started
22 asking for depositions in July of last year. I think we
23 asked for 21 or 22 at that time. And we just got dates for
24 those depositions in the last two weeks or three weeks.

25 We also have asked since then for another 30

1 depositions of individuals. And, so, we're over 50 people
2 that we've asked for depositions for. And now we do have
3 approximately 30 days, although when we were given dates, we
4 were given one day, one single day for each witness, and
5 told that these depositions should only last one day.

6 So, as a practical matter, we've been arguing about
7 what these depositions have looked like and who should be
8 involved in the depositions; for instance, the 30(b)(6)
9 depositions.

10 We sent, back in July, a 30(b)(6) notice that was sort
11 of overarching on regulatory, marketing, and several
12 different topics. And this is not intended to say this is
13 their fault at all. We have fault in this as well. We went
14 back and forth for a long period of time trying to
15 negotiate, you know, what the topics would be and who would
16 be able to, to talk about them.

17 And we've had tremendous problems deciding: Is there a
18 witness that can talk about seven products? And they've
19 told us multiple times that it would be impossible on some
20 of the products for one individual to learn everything about
21 seven products. And, so, it may be multiple witnesses.

22 The long and short of that is we've had one
23 deposition -- actually, we've had one and a half of a
24 30(b)(6) which occurred last week. I took the deposition of
25 one of the regulatory designees. And we were able -- in two

1 full days, we were able to get through essentially two and a
2 half of the products, and not all the topics even on those,
3 those products.

4 Now, at the end of the two days, there was discussion
5 about, "Are we done?" They say, you know, "You're done."
6 And we say, "Well, we're not done. We've got to do
7 discovery on the other ones."

8 And there's the issue of they say, "You have to do your
9 fact witness deposition of this witness who's also a fact
10 witness right now. And we're not going to bring this
11 witness back later because you had your opportunity to do
12 that now."

13 So, it, it's a very complicated thing and my concern
14 is -- that, that's the effect. The concern that we have is
15 that we get way down the line -- and we have talked about,
16 you know, just taking a few depositions and seeing if we can
17 get this worked out. And, in fact, we talked -- Ms. Jones
18 and I talked about that before today. And I'm okay with
19 doing that.

20 But my concern is that we get down the line and we have
21 a bunch of uncompleted depositions. And I think in Federal
22 Court there's a good argument that if you don't complete a
23 deposition, you can't play it at trial.

24 And this case is a little different than the New Jersey
25 case where their witnesses were within the subpoena power

1 because they're not going to be within the subpoena power
2 here if we have the trials here. And we may be, you know,
3 having to take or use a lot of these video depositions in
4 this courtroom and not able to, to have live witnesses here.

5 So, I believe that if we could -- the other concern I
6 have is that we get way down the line and, honestly, we
7 figure out the first bellwether, you know, trial is a TVT-O,
8 for instance, and we don't have much discovery done. And
9 Your Honors are saying, "Hey, you know, here we are a month
10 from trial. You guys didn't really discover that product in
11 full." And, you know, we didn't mention it to you.

12 And that's part of the reason I wanted to bring it up
13 at this time. I believe that if we were able to, you know,
14 narrow the discovery to certain products, it would be
15 beneficial to both sides. Some on my side would say, "Hey,
16 you're letting off the pedal. You need to drive them as
17 hard as you can to settlement."

18 But I believe -- we believe that we should, instead of
19 that, be very concerned about having our cases ready to be
20 tried in the best format they can in front of Your Honors so
21 that you don't have a crummy trial. You have one bellwether
22 that really tells you something. And I'm concerned that if
23 we don't narrow it at this point that we're not going to get
24 there by the January date.

25 MAGISTRATE JUDGE STANLEY: Ms. Jones.

1 MS. JONES: May I respond, Your Honor?

2 We have been trying to work with Mr. Cartmell and I,
3 I'm a little bit surprised to hear him say some of the
4 things that he has said this morning.

5 Your Honor will remember that we have already produced
6 about 50 witnesses from Prolift depositions in the State of
7 New Jersey. And we have an agreement that those will be
8 used and there will be not duplicative depositions.

9 And, in fact, some of those that are on the list that
10 they've asked for are people who have previously been
11 discovered, albeit on Prolift as opposed to some of the TVT
12 issues.

13 The -- I would like to address this in two different
14 ways first because the request is to limit the discovery
15 primarily on the TVT products. And the TVT products --
16 there are six products there. And, frankly, and I will be
17 candid with Your Honor, three of those products, the TVT,
18 the TVT-O, and the TVT-Secur, which are the products that
19 plaintiffs have asked that the discovery be narrowed to, do
20 amount to roughly 85 to 90 percent of the TVT cases, the SUI
21 cases.

22 We, we would be happy to limit the discovery to those
23 cases because it would make life much easier today. The
24 problem with that -- and this is what we've tried to work
25 out with plaintiffs' counsel -- is that to do that would

1 arguably leave us in a position of having to bring back all
2 of those people -- not all of them, but a significant number
3 of people to come back later on on the remaining TVT cases,
4 the other TVT product cases.

5 So, what we were trying to do was to figure out a way
6 that plaintiffs' counsel -- in fact, we went to them and we
7 said, "Okay, we're willing to limit the discovery here
8 provided you agree to limit the depositions on these other
9 cases, should it become an issue in the future, to one or
10 two per product," because they will have discovered
11 basically the main, the main TVT employees and so forth in
12 other discovery.

13 And they are, frankly, unwilling to agree to limit the
14 discovery should it become important on the other two cases.
15 And I understand -- I mean, I understand their position.
16 And I think both of us have a reasonable position that I'd
17 like to produce my folks one time even if it means you
18 produce them one time for two days or three days, but do it
19 at one time for efficiency sake and that's, that's all we
20 have to do so it's not a matter of bringing the same witness
21 back repetitively.

22 And I think that's more the issue that we have in terms
23 of limiting the discovery than anything else. And what we
24 have said to Mr. Cartmell is, "We're trying to work things
25 out," you know. We've given them -- for some of these

1 witnesses, one day is probably ample time. For some of the
2 witnesses, it may take two or three days. We're trying to
3 work with them. We have said, "We'll work with you and work
4 through some of the depositions."

5 We have asked, frankly, Your Honor, that they take the
6 fact witness portion of the 30(b)(6) at the same time -- the
7 fact witness deposition of the witness at the same time that
8 they do the 30(b)(6) deposition even if it's the next day so
9 it's done at one time just for efficiency purposes. And I
10 think we're trying to work things, work things through with
11 that. But I think the main issue is whether or not we limit
12 discovery to the product.

13 MAGISTRATE JUDGE STANLEY: You say that these
14 three TVT types are 90 percent of the SUI cases. Of all of
15 the cases that have been brought against J&J and Ethicon,
16 what percentage are SUI cases?

17 MS. JONES: My recollection, and don't hold me to
18 the exact number, is between 30 and 40 -- between 60 and
19 70 percent of all of the cases involve SUI products.

20 MAGISTRATE JUDGE STANLEY: But they may be both
21 SUI and POP?

22 MS. JONES: Some. There, there is a category that
23 involves both products, yes, Your Honor.

24 MAGISTRATE JUDGE STANLEY: Is that in addition to
25 the 60 or 70 percent?

1 MS. JONES: No, no, no. That's part of the 60 to
2 70 percent.

3 MAGISTRATE JUDGE STANLEY: Okay.

4 MS. JONES: The vast majority of our cases involve
5 an SUI product. My recollection is the last numbers I saw
6 were about 70 percent of our cases involve an SUI product.

7 MAGISTRATE JUDGE STANLEY: Mr. Cartmell, do you
8 agree with those numbers?

9 MR. CARTMELL: I do, Your Honor. I think that's
10 accurate. I don't know what percentage is SUI plus POP. I
11 think it's a fairly large percentage. So, some of those
12 will have both.

13 MAGISTRATE JUDGE EIFERT: I think what's difficult
14 for us is we really don't have any access to the discovery
15 and it's hard to make a decision or even a suggestion when
16 you don't know what you're talking about.

17 But of your -- of these employees, how many are there
18 that have information about all the products? Is that a
19 vast number of people?

20 MS. JONES: My recollection is that the plaintiffs
21 have asked for 44 depositions of the TVT plaintiffs that
22 include present and former employees. It's hard to answer
23 the question without going back, frankly, Your Honor, and
24 looking at each one of the individuals because some of those
25 are former employees. And, obviously, the former employees

1 have a limited number of products that they're familiar
2 with. They had new products coming on the market at the
3 same time.

4 My guess, without sitting down and looking at all of
5 it, is that 25 to 30 percent of them probably cover the
6 majority, if not all, of the products. But I haven't looked
7 at that. I'd have to go back.

8 MR. CARTMELL: Just from our review of the
9 documents, I would say it's quite a bit higher than that
10 because what you have is you have what's called the TVT line
11 of products.

12 And, so, a lot of the same scientists all the way from
13 the development period of time and the design period of time
14 through the regulatory 510(k) submissions all the way to
15 the, to the marketing of the products, they overlap with a
16 lot of these people.

17 So, you get the same -- the project teams are not
18 exactly the same. There's additional people on each one.
19 But you get sort of a core group who are involved in several
20 of the products.

21 MAGISTRATE JUDGE EIFERT: And that's a fairly
22 large group.

23 MR. CARTMELL: I think it's greater than
24 50 percent for sure.

25 MAGISTRATE JUDGE EIFERT: Okay. That's one of

1 those things you should try to work out, but I would think
2 there would have to be a motion made, you know, if you can't
3 work it out. It's just too hard to sit up here and try to
4 put that together.

5 MR. CARTMELL: Okay.

6 MS. JONES: What I would suggest -- I know that
7 Mr. Cartmell -- part of his problem was -- his concern was,
8 and rightly so, that, that we don't want to be criticized by
9 the court for not bringing the issue to the attention early
10 on.

11 We've got depositions scheduled. We're going to try to
12 work things out. If we just come back, you know, in April
13 or something if we -- you know, we'll see if we can work
14 something out that's more definitive, something there for
15 the court if need be.

16 This is not a problem, Your Honor, of lack of
17 cooperation on this issue. It is not a -- it's not a
18 problem in terms of us trying to figure out what's the most
19 efficient way for all of us to have them.

20 MAGISTRATE JUDGE STANLEY: It seems worth
21 mentioning that the whole idea of a bellwether trial is to
22 prevent having to try 14,000 cases. And, so, that the
23 likelihood of trials as to, as to products that were not
24 used very much just plummets. And, so, you wonder what's
25 the best use of time here.

1 MS. JONES: You know, we've, we've had that very
2 discussion. But that was the reason that we suggested,
3 well, let's do an agreement that, that will take those off
4 the table. But, but you'll agree there will be a limited
5 number of depositions taken should this, these other
6 products become at issue later on.

7 MR. CARTMELL: In a way --

8 MS. JONES: That's what we were trying to get to
9 is to avoid having to do another 50 depositions.

10 MAGISTRATE JUDGE STANLEY: Well, you can always
11 throw in a clause such as "except as otherwise ordered by
12 the Court."

13 MS. JONES: All right.

14 MAGISTRATE JUDGE STANLEY: And, you know, that
15 solves a lot of problems.

16 MR. CARTMELL: I think that's right. And we would
17 be willing to -- I think what was offered was actually one
18 deposition entirely for each of those other two products.
19 And we can't do that as fiduciaries representing all those
20 other attorneys out there that have those cases. Obviously,
21 we can't agree to one deposition.

22 But I think maybe there are some limitations that could
23 be made. And, of course, we wouldn't duplicate the
24 questioning that we did before.

25 MAGISTRATE JUDGE STANLEY: Okay. Do you want to

1 move on to production of outside U.S. documents?

2 MS. JONES: I think, I think we can quickly deal
3 with that in that we have agreed upon the priorities. And,
4 that is, there's not anything in dispute at all with respect
5 to that. And those documents are -- some of them have been
6 produced and are in the process of a rolling production that
7 we've agreed upon in terms of -- the plaintiffs have
8 prioritized which documents they've asked us to produce on a
9 timely basis.

10 MAGISTRATE JUDGE STANLEY: All right.

11 Boston Scientific.

12 MR. STRONGMAN: The only thing I would add simply
13 just to update the Court, we are in the middle of company
14 witness depositions. I think we have somewhere in the range
15 of 20 scheduled over the next couple months. We're well
16 into our document production and, and we're all making good
17 progress and working cooperatively together with Mr. Clark
18 and Ms. Wagstaff.

19 MS. WAGSTAFF: I agree with that, Your Honor.

20 MAGISTRATE JUDGE STANLEY: Okay. The next status
21 conference is April 18th at 1:00 p.m. I'll be packing my
22 suitcase for Spain.

23 MR. GARRARD: Your Honor, the next hearing will be
24 here or in your chambers?

25 MAGISTRATE JUDGE STANLEY: I think it will be here

1 because we've got the chairs here. So, we're in good shape.

2 (Proceedings concluded at 11:45 a.m.)

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8 I, Lisa A. Cook, Official Reporter of the United

9 States District Court for the Southern District of West

10 Virginia, do hereby certify that the foregoing is a true and

11 correct transcript, to the best of my ability, from the

12 record of proceedings in the above-entitled matter.

13

14

15 s\Lisa A. Cook

March 25, 2031

16 Reporter

Date

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